Tentative Rulings for October 27, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

14CECG03371 ***Ornelas et al. v. Lazaro et al. and related cross-complaints*** **(Dept. 403)**

15CECG03951 ***Lance William Green v. California Department of Corrections and Rehabilitation*** **(Dept. 403)**

14CECG03184 ***Sims v. Autozone, Inc.*** **(501)**

16CECG00919 ***City of Fresno v. Guadalupe Fernandez*** **(Dept.503)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

11CECG04395 ***Switzer v. Flournoy Management*** **is continued to December 8, 2016 at 3:30 p.m. in Dept. 501**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(24) **Tentative Ruling**

Re: ***Caudillo-Murrillo v. Carey***
Court Case No. 14CECG00156

Hearing Date: **October 27, 2016 (Dept. 402)**

Motion: Defendant Maja Mae Freund's Motion for Summary Judgment or Adjudication

Tentative Ruling:

To grant summary judgment in favor of defendant Maja Mae Freund. (Code Civ. Proc. § 437c, subd. (p)(2).) Defendant is directed to submit to this court, within 5 days of service of the minute order, a proposed judgment consistent with the court's summary judgment order.

Explanation:

Moving defendant met her burden of production on the motion, establishing that no negligence on her part caused any of plaintiff's injuries. Plaintiff has filed a notice indicating he did not oppose the motion, and thus has raised no triable issue of any material fact as to moving defendant.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 10/26/16
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Boyd v. J.H. Boyd Enterprises, Inc., et al.***, Superior Court Case No. 14CECG03792, consolidated with

J.H. Boyd Enterprises, Inc. v. Boyd et al., Superior Court Case No. 15CECG00915

Hearing Date: **October 27, 2016 (Dept. 402)**

Motion: (1) Martha Marsh, Robert Marsh, Louise Autenrieb and Frederick Autenrieb and J.H. Boyd Enterprises, Inc.'s Motion for Summary Judgment or Adjudication
(2) Martha Marsh, Robert Marsh, Louise Autenrieb and Frederick Autenrieb's Motion to Bifurcate 11th Cause of Action

Tentative Ruling:

Motion for summary judgment or adjudication: To deny summary judgment. (Code Civ. Proc. § 437c(c).) To grant summary adjudication of causes of action 1-5, 10-19 of the First Amended Cross-Complaint (filed by Ken Boyd, both individually and with Susan Boyd as Trustees of The Boyd Trust Dated December 23, 1999), as to cross-defendants Martha Marsh, Robert Marsh, Louise Autenrieb, and Frederick Autenrieb, and J.H. Boyd Enterprises, Inc. only. (Code Civ. Proc. § 437c(f)(1).) To deny as to causes of action 6-8.

To deny the motion for summary judgment directed at Lizbeth Boyd's Second Amended Complaint. (Code Civ. Proc. § 437c(f)(1).)

To deny the motion to bifurcate as moot in light of the ruling on the motion for summary adjudication.

Explanation:

Initially, the court wishes to advise the parties that memoranda in support of or in opposition to a summary judgment motion that does not include citations to evidence or to the separate statement distinctly unhelpful. It makes the court's burden in evaluating the merits of a motion much more difficult, as the court is forced to search through lengthy separate statements and voluminous evidentiary submissions for the evidence supporting the factual representations in the memoranda. A memorandum should always include citations to the relevant undisputed material fact and supporting evidence where factual representations or references are made. Every memorandum filed in connection with this motion failed in this regard.

Motion for Summary Judgment / Adjudication of Ken Boyd Cross-Complaint

First the court makes a few preliminary points.

Though the motion is directed at the initial Cross-Complaint, the motion will be treated as directed at the operative pleading, the First Amended Cross-Complaint ("FACC"), where no substantive new allegations were added to the FACC.

Cross-complainants filed an oversized memorandum without first obtaining leave of court as required by Rule of Court 3.1113(e). The court has disregarded anything beyond the 20th page. (Cal. Rules of Court, Rules 3.1300(d), 3.1113(d), (g).)

Even if cross-defendants prevailed on all arguments, summary judgment cannot be granted because the motion does not address all causes of action (the ninth cause of action is not addressed).

Causes of action based on the oral extension agreement

The first four causes of action are for (1) breach of contract, (2) promissory estoppel, (3) breach of implied covenant of good faith and fair dealing, (4) interference with contract.

These causes of action all pertain to the $2.5 million loan made by J.H. Boyd Trust to the Boyd Trust, and the alleged "Option Agreement": "At the time that the Note and Deed of Trust were executed, J.H. Boyd, as Trustee of the J.H. Boyd Trust, agreed with Ken Boyd that the Boyd Trust had the option to extend the deadline of the Note as often as Ken Boyd felt was reasonably necessary. This agreement was made orally, and is referred to herein as the 'Option Agreement'." (FACC ¶ 26.)

The motion as directed at the oral extension agreement is largely duplicative of J.H. Boyd Enterprises, Inc.'s, motion for summary judgment heard on 10/4/16. On 10/11/16 the court ruled in favor of JHBE's claims of breach of the promissory note. The court held that the oral extension agreement is unenforceable. The arguments and facts in this motion pertaining to the enforceability of the oral extension agreement are the same as those made in connection with JHBE's motion. The first cause of action in the Boyd Trust's FACC is for breach of the oral extension agreement. As the arguments and facts are the same, the court again finds that the oral agreement is unenforceable. (See 10/11/16 Order After Hearing.) For this reason summary adjudication is granted as to the first cause of action.

The second cause of action is for promissory estoppel, pled as an alternative to the first cause of action for breach of contract. (FACC ¶ 41.)

This cause of action is effectively moot, as the court has already granted summary adjudication in favor of JHBE on the cause of action for breach of the note. Additionally, the court already in ruling on JHBE's motion for summary judgment that "the alleged oral agreement appears to be more in the nature of prior negotiations,

which was superseded by the execution of the written contract. (See *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 344.)" (10/11/16 Order After Hearing.) "Estoppel cannot be established from such preliminary discussions and negotiations." (*The National Dollar Stores v. Wagnon* (1950) 97 Cal.App.2d 915, 919.)

The third cause of action is for breach of the implied covenant of good faith and fair dealing. It alleges cross-defendants' denial of Ken Boyd's 8/13/14 request for an extension of the note pursuant to the oral extension agreement. (FACC 54, 57.)

> There is no obligation to deal fairly or in good faith absent an existing contract. (*Hess v. Transamerica Occidental Life Ins. Co.* (1987) 190 Cal.App.3d 941 [235 Cal.Rptr. 715]; *Beck v. American Health Group Internat., Inc.* (1989) 211 Cal.App.3d 1555 [260 Cal.Rptr. 237].) **If there exists a contractual relationship between the parties, as was the case here, the implied covenant is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated in the contract**. (*Gibson v. Government Employees Ins. Co.* (1984) 162 Cal.App.3d 441, 448 [208 Cal.Rptr. 511].)

(*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1032, emphasis added.)

The implied covenant "cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 349-350.) As the court previously held, the oral extension agreement conflicts with the express terms of the written agreement made by the Boyd Trust with the J.H. Boyd Trust (JHBE's predecessor).

The opposition points out that in response to Ken Boyd's request for an extension, JHBE demanded an increase in annual payments of more than double the current payment amount, as well as additional security on the note. However, the opposition (even if it is considered at the 21st page) cites to no authority indicating that requesting something in return for renegotiating the terms of a written agreement constitutes a breach of the covenant of good faith and fair dealing. Summary adjudication should be granted as to the third cause of action.

The fourth cause of action is for interference with contract – specifically the oral extension agreement. The FACC alleges that "Martha Marsh, Louise Autenrieb, and Robert Marsh attempted numerous times to convince J.H. Boyd to renege on the terms of the Option Agreement. [¶] When it became apparent that J.H. Boyd would not renege on the Option Agreement, Cross-Defendants, Martha Marsh, Louise Autenrieb, and Robert Marsh, as Board of Directors of the Corporation, purchased the $2.5 Million Loan with the intent of breaching the terms of the Option Agreement." (FACC ¶ 67-68.)

"A cause of action for intentional interference with contract requires an underlying enforceable contract." (*PNC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 601.) Since the alleged option agreement was not enforceable, there is no viable claim for interference with contract.

Additionally, a party to the contract cannot be liable for interference with that contract. "The tort duty not to interfere with the contract falls only on strangers – interlopers who have no legitimate interest in the scope or course of the contract's performance." (*Applied Equip. Corp. v. Litton Saudi Arabia, Ltd.* (1994) 7 Cal.4th 503, 514.) Cross-defendants to this cause of action were directors for JHBE, the holder of the note. They were not strangers to the contract with no legitimate interest in it. An agent and principal are the same entity or person, and an entity or person cannot conspire with itself. (*Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 576.)

Fifth cause of action for defamation

This cause of action alleges that Martha Marsh, Louise Autenrieb, Robert Marsh and Fredrick Autenrieb made certain false statements to J.H. Boyd and other unspecified third parties. Cross-defendants deny having ever made the statements attributed to them. (UMF 30, 32, 34, 36.) The court finds that cross-defendants have met their threshold burden as the moving parties, since they would have personal knowledge of whether or not they have ever made the alleged statements.

The opposition disputes these denials based solely on Ken Boyd's declaration, where he alleges on information and belief that the statements were made. (Boyd Dec. ¶ 50.) This is insufficient to create a triable issue of fact. The party opposing summary judgment must produce admissible evidence raising a triable issue of fact. Claims and theories not supported by admissible evidence do not raise a triable issue. (*Rochlis v. Walt Disney Co.* (1993) 19 CA4th 201, 219.) "Substantial" responsive evidence is required. Evidence that gives rise to no more than mere speculation is insufficient to establish a triable issue of material fact. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163 [bare assertion that moving party "fabricated" evidence insufficient to avoid summary judgment].) The opposing party may not rely on allegations or denials in its pleadings. Rather, it must "set forth the specific facts showing that a triable issue of material fact exists." (Code Civ. Proc. § 437c(p)(2).) Cross-defendants fail to produce evidence raising a triable issue of fact as to whether the alleged false statements were ever made.

As a separate ground for summary adjudication, the moving parties contend that the communications are covered by the privilege under Civ. Code § 47(c), which precludes liability for communications made without malice to a person interested therein. (See Civ. Code § 47(c).) Each cross-defendant also denies making any of the alleged statements while bearing malice toward cross-complaints. (See UMF 31, 33, 35, 37.) The opposition is supported by no actual evidence of malice.

Sixth cause of action for breach of fiduciary duty

The sixth cause of action alleges that cross-defendants breached their duties as majority shareholders, owed to Ken Boyd as a minority shareholder of the corporation, by the following acts:

a. They refused to allow Ken Boyd to sell his stock against the provisions of the by-laws of the Corporation.

b. They purchased the $2.5 Million Loan with the intent of breaching the duties and responsibilities owed to Ken Boyd in regards to the Option Agreement.

c. They habitually failed to comply with various requirements of California Corporation Code.

(FACC ¶ 81.)

Cross-defendants' UMF 38 posits that "Cross-Defendants did not do the acts alleged to constitute a breach of their fiduciary duty." (UMF 38.) Cross-defendants filed declarations each denying that they did the three separate acts of breach. However, the moving papers do not affirmatively negate the first alleged breach (FACC ¶ 81(a)). There is no discussion in the moving papers of the provisions of the bylaws or whether any refusal of any attempt by Ken Boyd to sell his stock complied with the terms of the bylaws. With at least that much of the cause of action surviving, summary adjudication cannot be granted.

Cross-defendants also contend that cross-complainants cannot prove that they did anything that would negate the business judgment rule presumption that their decisions were based on their sound business judgment. (*Katz v. Chevron Corp.* (1999) 2 Cal.App.4th 1352, 1366.) The sole evidence in support of this contention is the self-serving statement that cross-defendants exercised their best business judgment to do what is right for the corporation and its shareholders. (Martha Marsh Dec. ¶ 14, Louise Autenrieb Dec. ¶ 16, Robert Marsh Dec. ¶ 10.) But the moving parties bear the initial burden of production to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) The moving papers include no discussion of, for example, in what ways the Boyd Trust contends that cross-defendants failed to comply with the Corporations Code. Merely raising the issue of the business judgment rule is insufficient to satisfy their burden as the moving parties.

Seventh and eighth causes of action

These causes of action in the FACC allege breaches of fiduciary duty or acts of negligence that were not alleged in the initial cross-complaint, including voting to use corporate assets for their personal benefit, and to use corporate funds to pay for personal legal expenses in violation of Civ. Code § 317. (FACC ¶ 88(j), (k), 98(h), (i).) Since the motion does not negate all claimed breaches of fiduciary duty, the motion cannot be granted as to these causes of action.

Eleventh through sixteenth causes of action

In response to these causes of action, as with the fifth cause of action, cross-defendants deny having done the things that the cross-complaint alleges were wrongful and provide the basis for the causes of action.

For example, the eleventh cause of action lists eight different acts of undue influence done by cross-defendants. (FACC ¶ 122.) Cross-defendants deny that they did these things. (Martha Marsh Dec. ¶ 22; Louise Autenrieb Dec. ¶¶ 25, 26.) They would have personal knowledge of whether or not they had done such things. The

opposition relies on the allegations based on information and belief in Ken Boyd's declaration (see response to UMF 45; Boyd Dec. ¶¶ 53-60), which as discussed above, is inadequate to raise a triable issue of fact. For this reason summary adjudication should be granted. For the same reason summary adjudication of the twelfth through sixteenth causes of action should be granted.

Seventeenth cause of action for intentional infliction of emotional distress

This cause of action is based in part on the alleged mistreatment by cross-defendants of Joe Boyd, who is not a party, by denying his request to sell some of his stock in JHBE. (FACC ¶¶ 167-172.) As the moving papers point out, cross-complainants do not have standing to complaint about the alleged mistreatment of someone else. (*Christianson v. Superior Court* (1991) 54 Cal.3d 896, 904.)

The remainder of the cause of action is based on the denial of Ken Boyd's request for an additional extension of the note "to which he was entitled" after his quadruple bypass surgery, verbally attacking him and making demands on him in the process. (FACC ¶¶ 173-180.)

"The elements of the tort of intentional infliction of emotional distress are: ' "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct...." Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community.'" (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.)

Merely enforcing the corporation's contractual rights cannot be deemed outrageous conduct sufficient to support a cause of action for intentional infliction of emotional distress.

Eighteenth cause of action for negligent infliction of emotional distress

This cause of action is based on the same facts as the seventeenth. It is premised on the contention that cross-defendants denied Ken Boyd the extension "to which he was entitled." (FACC ¶ 198.) The court is unaware of any authority providing that the exercise of one's contractual rights can support a cause of action for negligent infliction of emotional distress, even if such emotional distress could be anticipated or expected.

Nineteenth cause of action for conspiracy

Summary adjudication should be granted because conspiracy is not a standalone cause of action. (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 784.)

Motion for Summary Judgment / Adjudication of Lizbeth Boyd's Second Amended Complaint

, Lizbeth Boyd alleges that she acquired stock in J.H. Boyd Enterprises, Inc. ("JHBE") after her husband passed away. She has attempted to sell the stock back to the corporation or to a third party, but defendants (JHBE, Louise Autenrieb, Martha Marsh, and Ken Boyd) have tried to force plaintiff to sell her stock for less than fair value, tried to squeeze her out, took the position that only lineal descendants can own shares of the stock, and insisted on setting the price for any sale of the stock to a third party. Lizbeth alleges that defendants violated their fiduciary duties and acted in derogation of their obligations to the corporation. The SAC alleges causes of action for (1) breach of fiduciary duty (direct to plaintiff), (2) breach of fiduciary duty (derivative claim on behalf of the corporation), (3) dissolution and accounting, and (4) declaratory relief.

Fourth cause of action for declaratory relief

Summary adjudication of this cause of action is denied because JHBE fails to meet its burden as the moving party.

JHBE fails to produce evidence establishing UMF 64, that the buy-sell agreement was approved by a majority of the shareholders of JHBE. The only evidence cited is the buy-sell agreement itself, which does not clearly establish that a majority of the shareholders, or shareholders owning a majority of the shares, approved the buy/sell agreement. Nor do defendants provide or discuss any authorities providing that approval of a simple majority is sufficient to make such an agreement enforceable. There is no discussion of the procedures or formalities that must be followed to implement such an agreement.

Defendants contend that the right of first refusal provision requiring Lizbeth to offer to the corporation and to other JHBE shareholders her stock first at the proposed price she intends to sell to an outside party is legally enforceable and does not render the buy-sell agreement void. Defendants cite to Corp. Code § 204(b), 2603(b), and 212(b)(1), and *Tu-Vu Drive In Corp. v. Ashkins* (1964) 61 Cal.2d 283, 288. However the discussion in defendants' memorandum on this point is inadequate. There is no discussion of the terms of the buy-sell agreement or citation to the relevant provisions. And there is no application or discussion of the cited authorities.

Without discussing the relevant terms of the buy-sell agreement or how it compares to relevant authority, defendants assert that the formulas similar to the one set forth in the JHBE buy/sell agreement have long been recognized as lawful and appropriate, citing *Stevenson v. Drever* (1997) 16 Cal.4th 1167, 1173; Freidman, Cal. Practice Guide: Corporations (TRG 2014) § 3:187-3:191; *Yeng Sue Chow, supra*.) However, there is no discussion of the formula in the buy-sell agreement in this case or in the authorities cited.

Defendants assert that Lizbeth's assertion that procedural requirements were not complied with in connection with the adoption of the buy/sell and related amended bylaws is simply inaccurate. They point out that the board of directors affirmed the

buy/sell agreement and adopted amended bylaws that confirm the validity of the agreement. But they do not cite to or discuss any relevant provisions of the bylaws which would indicate that proper procedures were in fact followed. There is no analysis here; merely conclusions.

The cursory discussion of this cause of action is inadequate to meet defendants' burden.

Summary adjudication of issue of duty

Defendant next seek summary adjudication providing that they did not have a fiduciary duty as majority shareholders because they are not majority shareholders.

First, this is not a proper subject for summary adjudication. Code of Civil Procedure section 437c(f)(1) provides:

> A party may move for summary adjudication as to … one or more issues of duty, if that party contends … that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty.

"[T]he intent behind the change in subdivision (f): 'It is also the intent of this legislation to stop the practice of adjudication of facts or *adjudication of issues that do not completely dispose of a cause of action or a defense.*'" *(Regan Roofing Co. v. Superior Court* (1994) 24 Cal.App.4th 425, 433.) Adjudication of a duty to defend issue that leaves unclear the consequences of the failure to defend is "preliminary or advisory in character, and does not fully dispose of any portion of the action; it is inconsistent with the legislative intent of section 437c, subdivision (f)." (*Id.* at p. 437.)

"[S]ummary adjudication is meant to dispose of an entire substantive area." (*Catalano v. Superior Court* (2000) 82 Cal.App.4th 91, 97.) "The purpose of the enactment of Code of Civil Procedure section 437c, subdivision (f) was to stop the practice of piecemeal adjudication of facts that did not completely dispose of a substantive area." (*Ibid.*)

The moving papers give no indication of what will be resolved by summarily adjudicating this issue. They identify no cause of action that would be fully resolved by adjudicating this discrete issue.

There is mention of the first cause of action for breach of fiduciary duty. But adjudicating the issue would not dispose of this cause of action. Martha Marsh, Louise Autenrieb, and Robert Marsh are alleged to be shareholders, officers [except for Robert] and directors of JHBE. (SAC ¶¶ 3-5.) The first cause of action alleges that Martha Marsh, Robert Marsh and Louise Autenrieb owe Lizbeth fiduciary duties because she is a minority shareholder. (SAC ¶ 38.) It does not allege that their duties stem from their positions as majority shareholders. The opposition relies on duties owed by

defendants as directors. (Oppo. p. 15.) Thus, summary adjudication of this discrete duty issue would not resolve anything.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 10/26/16
(Judge's initials) (Date)

2 **Tentative Ruling**

Re: ***Serquina et al. v. Mata***
Superior Court Case No. 15CECG02765

Hearing Date: October 27, 2016 (Dept. 402)

Motion: Motion for terminating and monetary sanctions

Tentative Ruling:

To grant the defendant Melissa Ann Mata's motion for terminating sanctions and an order dismissing the complaint of plaintiff Cecilia Gonzalez. Code of Civil Procedure §2023.030(d)(3). Pursuant to CCP §2023.030(d)(1), the complaint filed by Cecilia Gonzalez on August 28, 2015 against defendant Melissa Ann Mata is dismissed with prejudice.

To grant defendant Melissa Ann Mata's motion for monetary sanctions. Cecilia Gonzalez is ordered to pay monetary sanctions to the law offices of Wilkins, Drolshagen and Czeshinski in the amount of $330 within 30 days after service of this order. Code of Civil Procedure §2023.030(a).

Explanation:

There is evidence that plaintiff Cecilia Gonzalez has engaged in misuse of the discovery process. There is no indication that any lesser sanction will result in plaintiff responding to the outstanding discovery. There is no indication that a lesser sanction will compel compliance with the discovery laws. The court dismisses the complaint filed on August 28, 2015 against defendant Melissa Ann Mata.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 10/26/16
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Sunnyside Baptist Church of Fresno, California v. Association of Baptists for World Evangelism, Inc.***
Superior Court Case No. 16 CECG 01325

Hearing Date: October 27, 2016 **(Dept. 402)**

Motion: By Plaintiff to Enter Judgment pursuant to CCP § 664.6

Tentative Ruling:

To grant the motion pursuant to CCP § 664.6. Plaintiff is ordered to submit a proposed judgment consistent with the Settlement Agreement. [*Hines v. Lukes* (2008) 167 Cal.App.4th 1174, 1185-1186.] The proposed judgment is to be submitted within 10 days of notice of the ruling. Notice runs from the date that the Clerk places the Minute Order in the mail.

Explanation:

Background

This case concerns real property located at 6269 E. Kings Canyon Rd. and 6286 E. Kings Canyon Rd., Fresno, California. Its APN is 313-040-68. It is presently owned by Plaintiff. Prior to 1985, the Property was owned by Lester C. Hotchkiss Alpha L. Hotchkiss. On or 28, 1984, Lester Alpha Hotchkiss conveyed the Property to the Association of Baptists for World Evangelism by of gift deed ("1984 Deed"). This Deed contains a condition restricting the religious property to use in accordance with the Baptist Doctrine ("Condition").

On or about April 1990, the Association of Baptists conveyed the property to the Plaintiff. Plaintiff now wishes to convey the property free of the Condition which it asserts constitutes "a cloud on the title." As a result, on April 27, 2016, Sunnyside Baptist Church of Fresno filed a Complaint seeking to quiet title, alleging a violation of the Unruh Act and seeking declaratory relief. It named the Association of Baptists for World Evangelism, a New Jersey nonprofit corporation; the General Association for Regular Baptist Churches, an Illinois nonprofit corporation as Defendants and Does 1-20.

On July 28, 2016, the Plaintiff and the Association of Baptists reached a settlement whereby the latter acknowledged and agreed that it possessed no right, title and interest in the Property and waived the benefit of or right to exercise any option to purchase, right of reverter, or other possessory right in or to the Property or any rights claimed to exist under the Condition. As for the General Association for Regular Baptist Churches, it was dismissed with prejudice on September 30, 2016.

On September 29, 2016, Plaintiff filed a motion seeking entry of judgment pursuant to CCP § 664.6 on the grounds that the title company will not accept the Settlement Agreement as proof that the "cloud on the title" has been removed. See Memorandum of Points and Authorities at page 2 lines 17-26. The Settlement Agreement is attached to the Declaration of Rigby as Exhibit 2. The motion is unopposed.

Merits

CCP § 664.6 states:

> If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, **may enter judgment pursuant to the terms of the settlement**. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.
>
> The requirements of CCP § 664.6 have been met:
>
> - The litigation is pending before the court;
> - The settlement agreement is in writing; and
> - The settlement agreement is signed by the parties.

Therefore, the motion will be granted.

Pursuant to California Rules of Court, Rule 3.1312, subd.(a) and Code of Civil Procedure § 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 10/26/16
(Judge's initials) (Date)

Tentative Ruling

(17)

Re: ***De La Luz Lopez v. Gibson Wine Co. et al.***
Superior Court Case No. 13 CECG 01745

Hearing Date: October 27, 2016 (Dept. 402)

Motion: Petitions for Minors' Compromise

Tentative Ruling:

To grant. Orders signed. Hearings off calendar.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 10/26/16
(Judge's initials) (Date)

Tentative Rulings for Department 403

(20) **Tentative Ruling**

Re: ***Marcum v. St. Agnes Medical Center et al.***, Superior Court Case No. 15CECG01327

Hearing Date: **October 27, 2016 (Dept. 403)**

Motion: Sharon Wimberley's Motion for Judgment on the Pleadings of Third Amended Complaint's First Cause of Action

Tentative Ruling:

To grant the motion without leave to amend. (Code Civ. Proc. § 438(c)(B)(ii).)

Explanation:

Defendant Sharon Wimberley moves for judgment on the pleadings of the first cause of action for wrongful death on the ground that plaintiff fails to allege the element of damages.

The elements of the cause of action for wrongful death are the tort (negligence or other wrongful act), the resulting death, and the damages, consisting of the **pecuniary loss suffered by the heirs**. (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1263.) The TAC fails to plead that plaintiff suffered any pecuniary loss in connection with the alleged wrongful death of his mother. The request for judicial notice is denied, as discovery responses and the request for judicial notice do not cure the TAC's failure to plead a necessary element. Given the proximity of the trial date no leave to amend will be granted.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 10/25/16
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***State of California v. Ross Family Properties, LLC, et al.***
Court Case No. 15 CECG 01191

Hearing Date: October 27, 2016 (Dept. 403)

Motion: Plaintiff's Motion for Ruling on Issue Affecting the Determination of Compensation Re: Defendants' Entitlement to Goodwill and/or loss of Earning for Future Crops

Tentative Ruling:

To deny.

If any oral argument is requested, it will be entertained on November 3rd, 2016 at 3:30 p.m. in Department 403.

Explanation:

Code of Civil Procedure section 1260.040 provides, in subdivision (a): [i]f there is a dispute between plaintiff and defendant over an evidentiary or other legal issue affecting the determination of compensation, either party may move the court for a ruling on the issue. The motion shall be made not later than 60 days before commencement of trial on the issue of compensation. The motion shall be heard by the judge assigned for trial of the case." The Law Revision Commission Comment provides, "Section 1260.040 is intended to provide a mechanism by which a party may obtain early resolution of an in limine motion or other dispute affecting valuation. It should be noted that the procedure provided in this section is limited to resolution of legal issues that may affect compensation; it may not be used to ascertain just compensation." (31 Cal. L. Rev. Comm. Reports 83 (2001).)

Section 1260.040 can be used to determine a party's legal right to compensation for loss of business goodwill. (See Los Angeles Unified School Dist. v. Pulgarin (2009) 175 Cal.App.4th 101, 104.)

1. *Condemnation Terminates the Lease as to the Condemned Portion of the Land But Does Not Prohibit Compensation For Fixtures*

The State argues, that pursuant to Code of Civil Procedure section 1265.120, "where part of the property subject to a lease is acquired for public use, the lease terminates as to the part taken and remains in force as to the remainder." Further, "the rent reserved in the lease that is allocable to the part taken is extinguished." (Code Civ. Proc., § 1265.120.) Therefore, because Lindsey, the tenant, is no longer liable for the lease payments, the State reasons that he cannot recover for the profits to be made under the lease.

However, termination of the lease upon condemnation, whether by operation of law (Code Civ. Proc., § 1265.110) or pursuant to a lease providing for automatic termination, does not affect the tenant's right to compensation. The tenant remains entitled to compensation for the value of the leasehold interest taken unless the lease expressly provides to the contrary. (Code Civ. Proc., § 1265.150 ["Nothing in this article affects or impairs any right a lessee may have to compensation for the taking of his lease in whole or in part or for the taking of any other property in which he has an interest"]; *Id*., § 1235.170 [defining "property" to include "real and personal property and any interest therein"]; *Id*., § 1235.125 [defining "interest" to include "any right, title, or estate in property"]; *City of Vista v. Fielder* (1996) 13 Cal.4th 612, 617.) Accordingly, nothing prevents Lindsey from being compensated for his fixtures.

2. The Almond Trees Growing on the Land Will Be Valued as Part of the Land

That which is affixed to land is considered real or immovable property. (Civ. Code, § 658.) Trees are considered fixtures when they are attached to the land by their roots. (Civ. Code, § 660.) The State contends that the almond trees growing on the condemned parcel, will be valued within the compensation for the fair market value of the remainder and they should not be valued separately. Further, the State asserts, the earnings from crops the trees may have produced in the future would not be a separate item of compensation.

Improvements to the condemned property (fixtures, etc.) are properly taken into account in determining compensation to the extent they remain on the premises after the condemnor takes possession. (See Code Civ. Proc., § 1263.230; *New Haven Unified School Dist. v. Taco Bell Corp*. (1994) 24 Cal.App.3d 1473, 1483-1484.) "If the improvements serve to enhance the value of the property over its unimproved condition, the property receives the enhanced value; if the improvements serve to decrease the value of the property below its unimproved condition, the property suffers the decreased value." (Law Rev. Comm. Comment to Code Civ. Proc. § 1263.210; Code Civ. Proc., § 1263.210, subd. (a).) Accordingly, the value of the trees will be used as a measure of compensation. However, the trees are apparently only 3 years old and it is unknown whether they have reached maturity. As the date of valuation is the date of the deposit of probable compensation, the valuation of the trees as fixtures will likely not be high. Moreover, loss of profits from a business is not compensable as an element of damage in eminent domain (*Orange County Flood Control Dist. v. Sunny Crest Dairy, Inc*. (1978) 77 Cal.App.3d 742, 762.) It will be for experts to determine the effect the trees have on the value of the condemned parcel and the remainder. The value of the trees will be apportioned by the court between Ross and Lindsey so as not to represent a double recovery.

3. Defendants May Prove Entitlement to Loss of Goodwill

"When the State condemns property, its owner has a constitutional right to "just compensation." (U.S. Const., amend. V; Cal. Const., art. I, § 19.) That right does not, however, provide compensation for the loss of goodwill. (*Hladek v. City of Merced* (1977) 69 Cal.App.3d 585, 589, 138 Cal.Rptr. 194.) To remedy this perceived unfairness, our Legislature in 1975 created a statutory right for business owners to obtain

recompense for loss of goodwill. (§ 1263.510.)" (*People ex rel. Dept. of Transp. v. Dry Canyon Enterprises, LLC* (2012) 211 Cal.App.4th 486, 490–91.)
Code of Civil Procedure section 1263.510 "was enacted in response to widespread criticism of the injustice wrought by the Legislature's historic refusal to compensate condemnees whose ongoing businesses were diminished in value by a forced relocation." (*People ex rel. Dept. of Transportation v. Muller* (1984) 36 Cal.3d 263, 270.) "The purpose of the statute was unquestionably to provide monetary compensation for the kind of losses which typically occur when an ongoing small business is forced to move and give up the benefits of its former location." (*Ibid*.)

Subdivision (b) of Code of Civil Procedure section 1263.510 defines " 'goodwill' " as "the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage."

Subdivision (a) of Code of Civil Procedure section 1263.510 explains how to recover goodwill compensation: "The owner of a business conducted on the property taken, or on the remainder if the property is part of a larger parcel, shall be compensated for loss of goodwill if the owner proves all of the following: [¶] (1) The loss was caused by the taking of the property or the injury to the remainder. [¶] (2) The loss cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill. [¶] (3) Compensation for the loss will not be included in payments under Section 7262 of the Government Code. [¶] (4) Compensation for the loss will not be duplicated in the compensation otherwise awarded to the owner."

Here, The State claims that defendants cannot prove the loss of goodwill cannot reasonably be prevented by a relocation of the business. (Code Civ. Proc., § 1263.510, subd. (a)(2).) The State reasons the business that is the origin of the lost profits is the almond orchard. The almond trees are part of the land. Once the defendants are compensated for the condemned parcel, the State contends, defendants will have the ability to relocate the portion of their orchard that was acquired by the State.

This theory is rebutted by defendants. Almond trees cannot be moved. Moreover, almond trees do not bear crops for a number of years after planting. Furthermore, if an improvement is located partially on the portion of the property taken and partially on a part of the property that is not taken, the court can direct the condemnor to pay for the entire improvement when it is fair and equitable to do so. (Code Civ. Proc., § 1263.270.)

The State also asserts that defendants cannot recover goodwill because a claimant of a loss of goodwill must also prove that the loss will not be duplicated in the compensation otherwise awarded to the owner. (Code Civ. Proc, § 1263.510, subd. (a)(4).) The State argues that because the almond trees will be valued as part of the realty, the earnings from their future crops cannot be valued as goodwill as defendant Ross would receive duplicate compensation. The State claims that Lindsey would receive duplicate compensation because his lease has been terminated as to the taken parcel, so he cannot receive profits generated by that land.

First, to the extent this argument asserts that the value of the *future income* from the almonds will be taken into account in valuing the almond trees by some metric, this motion to prevent evidence of future income must fail. Second, the argument that Lindsey cannot receive compensation for his business and fixtures due to the termination of part of his leasehold is incorrect, as set forth above.

The state cites *People ex rel. Dept. of Transp. v. Dry Canyon Enterprises, LLC*, *supra*, 211 Cal.App.4th 486, as instructive. In that case, the State sought to widen a highway. The defendant operated a winery and vineyard. The state took 21% of the vineyard. The sole issue for trial was whether the defendant had lost any business goodwill. The State's expert on goodwill valuation opined that defendant was not profitable, and that its liabilities exceeded its assets. In light of this, the expert concluded that defendant never had any goodwill prior to the taking and accordingly experienced no loss of goodwill. Defendant's expert calculated the value of defendant's lost goodwill at $240,000. The expert reached this figure by averaging the results provided by two different methodologies.

The appellate court affirmed the trial court's finding that the defendant suffered no loss of goodwill because it present no competent evidence of preexisting goodwill. It explained "[a]lthough there is no single acceptable method of valuing goodwill [citation], the methodologies used to value goodwill are by and large based on a business's profitability [citations]. The predominance of profit-based yardsticks is a function of what goodwill represents. Goodwill is the amount by which a business's overall value exceeds the value of its constituent assets, often due to a recognizable brand name, a sterling reputation, or an ideal location. (*People ex rel. Dept. of Transp. v. Dry Canyon Enterprises, LLC*, *supra*, 211 Cal.App.4th at pp. 493–94.) The *Dry Canyon* court went on to explain how to analyze and award goodwill in cases such as the one before it where the business had no lost profits. Here, the state has introduced no evidence that Lindsey has liabilities greater than assets, has never made a profit, and has only speculative profits to bring the case into the holding of *Dry Canyon*. Moreover, Dry Canyon holds that profits *are* to be considered in calculating goodwill. Because the State has not excluded the possibility that Lindsey can recover goodwill, the motion will be denied.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 10/25/16
(Judge's initials) (Date)

Tentative Rulings for Department 501

(24) **Tentative Ruling**

Re: ***Patel v. Meeks***
Court Case No. 14CECG02854

and

Budwal v. Farmers Insurance Exchange
Court Case No. 16CECG02613

Hearing Date: **October 27, 2016 (Dept. 501)**

Motion: Motion of Plaintiff Joga Budwal to Consolidate Plaintiff's Underinsured Motorist Arbitration with Case #14CECG02854

Tentative Ruling:

To grant, consolidating for all purposes Case No. 14CECG02854 and Case No. 16CECG02613, with Case No. 14CECG02854 being designated as the master file.

Explanation:

Mercury Ins. Group v. Superior Court (1998) 19 Cal.4th 332 ("*Mercury*") does provide support for the type of "consolidation" plaintiff requests, even though this is not the standard type of consolidation. The instant case is not on all fours with *Mercury*: 1) in *Mercury* an arbitration proceeding had actually commenced regarding the uninsured motorist ("UIM") claim, and here it has not; 2) in *Mercury* the insurance company had moved to compel arbitration, whereas here it has not; and 3) in *Mercury* the UIM claim concerned the same accident at issue in the lawsuit, and here the UIM claim concerns the case which has now been dismissed (Case #15CECG00045, or the "Ferguson Action").

However, it appears the question addressed by the California Supreme Court in *Mercury* is the same one at issue on this motion:

> Does a trial court have authority to "consolidate" a contractual arbitration proceeding between an insurer and an insured as to uninsured motorist coverage in the insured's pending action against third parties – strictly speaking, does it have authority to join the insurer as a defendant as to uninsured motorist coverage issues – for all purposes, including trial, in order to avoid conflicting rulings on a common issue of law or fact?
>
> (*Mercury, supra,* 19 Cal.4th at p. 337.)

As to the first distinction noted above, it is not clear that the Court in *Mercury* was limiting its ruling to the procedural posture of that case, such that the actual

commencement of the arbitration is required before the issue of "consolidation" is ripe. In that case, plaintiffs initially demanded contractual arbitration and after it had commenced they moved to consolidate that arbitration with the UIM issues in the pending court case. (*Mercury at p.* 338.) It would seem little would be gained by requiring plaintiff to go through that step.

As to the second distinction, the same observation can be made. In *Mercury*, after the court had consolidated by granting plaintiffs' initial motion, and after the trial court had ordered the parties to non-binding judicial arbitration, the insurance company moved for separate judicial arbitration and contractual arbitration. (*Mercury* at pp. 338-339 and 349 [finding that the insurer's motion in effect was a motion to compel contractual arbitration].) On this motion plaintiff has provided uncontroverted evidence that counsel asked the insurer to stipulate to consolidation but it declined and said it agreed to contractual arbitration. This sufficiently indicates the insurer has asserted its contractual right to arbitration.

As to the third distinction (that the UIM claim is not regarding the same accident that is the subject of Case #14CECG02854), this also does not appear to put it outside the parameters of *Mercury*. The Court relied on the provisions of Code of Civil Procedure 1281.2, subdivision (c) as being "crucial" to its analysis (at p. 342), which provides that where one party to an arbitration agreement seeks to compel arbitration the court may decline to compel if it determines that a "party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the <u>*same transaction or series of related transactions*</u> and there is a possibility of conflicting rulings on a common issue of law or fact." (Code Civ. Proc. § 1281.2, subd. (c), emphasis added.) While the Court in *Mercury* focused on the phrase "same transaction," here the operative phrase is "series of related transactions."

Thus, the court concludes that *Mercury* applies, and the court has authority to join the insurer as a defendant to the Meeks Action (Case #14CECG02854) as to UIM coverage issues (regarding the Ferguson accident), for all purposes, including trial, in order to avoid conflicting rulings on common issues of law or fact. (*Mercury* at p. 345.) Plaintiff has now submitted a copy of the insurance policy which contains the arbitration agreement at issue. The court finds that an agreement to arbitrate the UIM claim exists. (Code Civ. Proc. § 1281.2.) The agreement does not appear to be governed by the Federal Arbitration Act, and thus application of subdivision (c) of Code of Civil Procedure section 1281.2 is not subject to federal preemption. (See *KPMG LLP v. Cocchi* (2011) 132 S.Ct. 23, 26; *Rodriguez v. American Technologies, Inc.* (2006) 136 Cal.App.4th 1110, 1114.)

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: <u>MWS on 10/25/16</u>
(Judge's initials) (Date)

Tentative Rulings for Department 502

(28) **Tentative Ruling**

Re: ***Nisei Farmers League v. California Labor and Workforce Development Agency***

Case No. 16CECG02107

Hearing Date: October 27, 2016 (Dept. 502)

Motion: By Plaintiff for Partial Declaratory Relief

Tentative Ruling:

To deny.

Explanation:

Plaintiffs seek "partial declaratory relief …. regarding the meaning of the statutory term 'actual sums due' as that term is used in subdivision (b) of section 226.2 of the California Labor Code."

Defendants are correct that there is no such motion as a "Motion for Partial Declaratory Relief." Code of Civil Procedure §1060 does not provide for an independent pre-trial resolution of declaratory relief and no such motion appears to be anticipated by either the Code or case law.

The only case law that Plaintiffs have provided to support their claim for such relief in the moving papers is *In re Claudia E.* (2008) 163 Cal.App.4th 627, 633-34, where a court reasoned that a motion for declaratory relief would be an expedient means to dispose of a child's claims in a juvenile dependency proceeding. (*Id.* at 637.) Because this is not a juvenile dependency hearing, the case is inapposite.

In the reply brief, Plaintiffs cite to other case law they claim supports the "motion for declaratory relief." Each of these cases did not squarely address the propriety of such a motion over an objection. In *NetJets Aviation, Inc. v. Guillory* (2012) 207 Cal.App.4th 26, 37, each side filed cross-motions, and so neither side objected to the unusual procedure. In *California American Water v. City of Seaside* (2010) 183 Cal.App.4th 471, 479, the appellate court was presented with the question of whether the water management problem was better resolved by petition for writ of mandate and not through a civil complaint - the propriety of the "motion for declaratory judgment" was not squarely analyzed. In *Augustyn v. Superior Court* (1986) 186

Cal.App.3d 1221, 1223, 1225-26, the appellate court, again, did not address the propriety of an expedited procedure for obtaining a declaratory judgment.

Although there are no reported cases holding that a "motion for declaratory relief" is forbidden, there is also no statutory or common law basis which authorizes a "motion for declaratory relief" absent the consent of all the involved parties.

Defendants ask the Court to consider this as a motion for reconsideration of the motion for preliminary injunction. Though certainly a court may disregard a motion's title and construe it as a different type of motion depending on the relief sought. (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 187, 193), a motion for reconsideration is based on different standards than one seeking final relief. (Code Civ.Proc. §1008.)

The motion could be considered a motion for judgment on the pleadings. However, Plaintiffs seek to rely on evidence outside the record, including e-mails from representatives of Defendants and declarations by members of Plaintiff's constituent organizations. Therefore, the motion would best be considered a motion for summary judgment, but, as Defendants have noted, Plaintiffs have not complied with the statutory requirements of Code of Civil Procedure §437c.

In the reply brief, Plaintiffs argue the Court has the inherent power to "adopt any suitable method of practice, both in ordinary actions and special proceedings, if the procedure is not specified by statute or by rules adopted by the Judicial Council." (*In re Reno* (2012) 55 Cal.4th 428, 522.) The court does not address whether its inherent discretionary power would extend to the requested relief because Plaintiffs have only sought application of that discretion in the reply brief.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 10/26/16
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Motley v. McMillin Homes***
Superior Court Case No.: 11CECG03547

Hearing Date: October 27, 2016 (**Dept. 502**)

Motions: (1) By Cross Defendant Carriveau-Spencer, Inc. dba James & Co. Lighting for determination of good faith of settlement;

(2) By Cross Defendant Clovis Sanger Cabinet Manufacturing, Inc. for determination of good faith of settlement

Tentative Ruling:

To grant both motions. The Court will execute the orders which have been submitted.

In a related matter, the Court will execute the proposed order granting the good faith of the settlement of Defendant/Cross Defendant, Airport Specialty Products, Inc.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 10/26/16
(Judge's initials) (Date)

Tentative Rulings for Department 503

03

Tentative Ruling

Re: ***Vang v. Vang***
Case No. 14 CE CG 03392

Hearing Date: October 27th, 2016 (Dept. 503)

Motion: Defendant Estate of Bee Pha's Motion to Expunge Notice of Pendency of Action and for Attorney's Fees and Costs

Tentative Ruling:

To grant the defendant's motion to expunge the notice of pendency of action. (Code Civ. Proc. §§ 405.30, 405.32.) To grant attorney's fees against plaintiffs, in the amount of $872.50. (Code Civ. Proc. § 405.38.) Plaintifs shall pay attorney's fees to defense counsel within 30 days of the date of service of this order.

Explanation:

"At any time after notice of pendency of action has been recorded, any party, or any nonparty with an interest in the real property affected thereby, may apply to the court in which the action is pending to expunge the notice." (Code Civ. Proc. § 405.30.) "The claimant shall have the burden of proof under Sections 405.31 and 405.32." (*Ibid*.)

"[T]he court shall order the notice expunged if the court finds that the pleading on which the notice is based does not contain a real property claim." (Code Civ. Proc., § 405.31.) In addition, "the court shall order that the notice be expunged if the court finds that the claimant has not established by a preponderance of the evidence the probable validity of the real property claim." (Code Civ. Proc., § 405.32.)

"'Real property claim' means the cause or causes of action in a pleading which would, if meritorious, affect (a) title to, or the right to possession of, specific real property or (b) the use of an easement identified in the pleading, other than an easement obtained pursuant to statute by any regulated public utility." (Code Civ. Proc., § 405.4.)

Here, the parties have settled the case and plaintiffs have filed a dismissal of the entire action with prejudice. Consequently, there is no longer any real property claim that would justify the maintenance of a *lis pendens* against the property. Also, plaintiffs promised as part of the settlement to withdraw their *lis pendens* within 90 days. However, there is no evidence that they have complied with this agreement to date. Thus, plaintiffs cannot meet their burden of showing that there is a valid claim against the real property, since their claim has been voluntarily dismissed with prejudice.

Plaintiffs claim in opposition that they served defense counsel with a notice of withdrawal of the *lis pendens* in June, and therefore no expungement order is necessary. They claim that their notice complied with Code of Civil Procedure section 405.50.

Section 405.50 states,

> At any time after notice of pendency of an action has been recorded pursuant to this title or other law, the notice may be withdrawn **by recording in the office of the recorder** in which the notice of pendency was recorded a notice of withdrawal executed by the party who recorded the notice of pendency of action or by the party's successor in interest. **The notice of withdrawal shall be acknowledged**. (Code Civ. Proc., § 405.50, emphasis added.)

Here, plaintiffs' counsel states that he served a copy of the notice of withdrawal on defense counsel, but he never states that he recorded the notice with the Fresno County Recorder's Office. Also, the copy of the notice attached to counsel's declaration does not include an acknowledgement signed or sealed by the county recorder or a notary public. Therefore, it does not appear that the notice of withdrawal was effective to withdraw the *lis pendens*, as it was not properly recorded or acknowledged. As a result, the court intends to grant the motion to expunge the *lis pendens*.

In addition, the court intends to grant the defendant's request for attorney's fees against plaintiffs. Under section 405.38, "The court shall direct that the party prevailing on any motion under this chapter be awarded the reasonable attorney's fees and costs of making or opposing the motion unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorney's fees and costs unjust." (Code Civ. Proc., § 405.38.)

Here, defendant is the prevailing party on the motion to expunge, so it should be awarded its reasonable attorney's fees in connection with bringing the motion. Defendant seeks $2,760 in fees based on seven hours of attorney time billed at $325 per hour, but this amount is unreasonable considering the simple nature of the motion. The court intends to award sanctions of $872.50 based on 2.5 hours of attorney time billed at $325 per hour and $60 in filing fees.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 10/26/16
(Judge's initials) (Date)

(30)

Tentative Ruling

Re: ***Estate of Ann Hart v. Willow Creek Healthcare Center, LLC.***

Superior Court No. 15CECG02999

Hearing Date: Thursday, October 27, 2016 (**Dept. 503**)

Motion: (1) Defendant Saint Agnes' Demurrer
(2) Defendant Saint Agnes' Motion to Strike

Tentative Ruling:

To **Order** the demurrer off calendar for failure to comply with Code of Civil Procedure section 430.41. *Parties must meet & confer as required by Code of Civil Procedure section 430.41. If the meet & confer is unsuccessful, then the demurring party may calendar a new date for hearing the demurrer to the original complaint.*

To **Deny** Motion to Strike in its entirety.

Explanation:

Demurrer
Before filing a demurrer, the demurring party must meet and confer in person or by telephone with the party that filed the pleading which is subject to the demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer. (Code Civ. Proc., §430.41(a).)

A demurring party must file and serve with the demurrer a declaration stating the means by which it met and conferred with the party that filed the pleading subject to demurrer and that the parties did not reach an agreement resolving the objections raised in the demurrer or stating that the party that filed the pleading subject to demurrer failed to respond to the demurring party's request to meet and confer or otherwise failed to meet and confer in good faith. (Code Civ. Proc., §430.41(a)(3).)

Here, Defendant Saint Agnes submits no evidence of compliance with Code of Civil Procedure section 430.41. Therefore, demurrer is ordered off calendar.

Motion to Strike
(1) *pg. 14: "Plaintiff prays for… punitive damages… according to proof"*

- Code of Civil Procedure section 425.13
"The purpose of the [Elder Abuse Act was] essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker (1999)* 20 Cal.4th 23, 33.) To this end, the Legislature added to the Act heightened civil remedies for egregious elder abuse, seeking thereby "to enable interested persons to engage attorneys to take up the

cause of abused elderly persons and dependent adults." (Welf. & Inst. Code, § 15600, subd. (j).) To burden such causes with section 425.13's procedural requirements when claims are made for punitive damages would undermine the Legislature's intent to foster such actions by providing litigants and attorneys with incentives to bring them. (*Covenant Care, Inc. v. Super. Ct.* (2004) 32 Cal.4th 771.) Therefore, section 425.13's limitations on actions for damages arising out of professional negligence do not apply to those who pursue the cause of abused elderly persons under the Elder Abuse Act. (*Id.* at p. 790.)

Here, Defendant argues that Plaintiffs' prayer for punitive damages should be stricken because they did not comply with Code of Civil Procedure section 425.13. (Memo, filed 9/27/16 ¶ B.) However, because the claim is based on Elder Abuse, Plaintiffs are not required to do so. Motion denied.

- Pleadings
To adequately assert Elder Abuse, "a plaintiff must allege conduct essentially equivalent to conduct that would support recovery of punitive damages." (*Covenant Care, supra,* 32 Cal.4th 771 at p. 789; Welf. & Inst. Code §§ 15600 et seq.) Failure to do so subjects the complaint to demurrer (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396), *not* for a Code of Civil Procedure section 436 motion to strike. (*Ferraro v. Camarlinghi (2008)* 161 Cal.App.4th 509, 529.)

Here, Defendant argues that Plaintiffs have not plead sufficient facts to establish a cause of action justifying punitive damages. (Memo, filed 9/27/16 ¶ C.) However, *here* a motion to strike cannot be used to challenge the sufficiency of Plaintiff's allegations because punitive damages do not require additional pleading. Motion denied.

- Ratification
Civil Code § 3294, subd. (b) provides in part: "With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." (see also *College Hosp. Inc. v. Super. Ct.* (1994) 8 Cal.4th 704, 726.)

Here, Defendant moves to strike punitive damages because Plaintiffs' complaint is "completely devoid of facts regarding actions or knowledge on the part of any St. Agnes employee, let alone a corporate officer, director or managing agent." (Memo, filed 9/27/16 ¶ D.) This argument goes to the sufficiency of the allegations in the pleading, which cannot be considered via motion to strike. Motion denied.

(2) *pg 14: "Defendants' duties under the EADCPA were breached in a manner that was reckless, malicious, oppressive, tainted by fraud, and generally reprehensible."*

"[t]he terms 'wilful,' 'fraudulent,' 'malicious' and 'oppressive' are the statutory description of the type of conduct which can sustain a cause of action for punitive damages. (Civ. Code, § 3294.) Pleading in the language of the statute is acceptable provided that sufficient facts are pleaded to support the allegations. The terms themselves are conclusory, however." (*Blegen v. Super. Ct.* (1981) 125 Cal.App.3d 959,

citing *Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6-7; *Smithson v. Sparber* (1932) 123 Cal.App.225, 232; *Faulkner v. California Toll Bridge Authority* (1952) 40 Cal.2d 317, 329.)

Here, Defendant moves to strike conclusory language on page 14 of Plaintiffs' SAC. (Memo, filed 9/27/16 ¶ A.) And although the terms themselves are conclusory, *if* they are supported by facts, they are permissible. Ultimately, this requires an analysis of the sufficiency of the allegations, which cannot be considered via motion to strike. Motion denied.

(3) *pg. 14: "The EADCPA also entitled the decedent's estate to legal fees and expenses…"*

The Elder Abuse Act provides for attorney's fees at Welf. & Inst. Code § 15657, subd. (a).

Here, Defendant argues that Plaintiffs' demand for attorney's fees should be stricken "for the reasons expressed in the Demurrer" and because "Plaintiff cannot maintain an elder abuse cause of action." (Memo, filed 9/27/16, ¶ III.) This argument goes to the sufficiency of the allegations, which cannot be considered via motion to strike. Motion denied.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 10/26/16
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Lopez v. Martinez***
Superior Court Case No.: 15CECG01660

Hearing Date: October 27, 2016 (**Dept. 503**)

Motion: By Defendants Brennen Daniel Martinez and David John Martinez to compel the deposition of Plaintiff Amanda Lopez and for monetary sanctions

Tentative Ruling:

To grant, with Plaintiff Amanda Lopez to attend a deposition and produce documents on November 18, 2016, at 9:00 a.m., at the law offices of Vail & Wells at 7108 N. Fresno Street, Suite 310, Fresno, CA 93720, and to grant Defendants' request for monetary sanctions against Plaintiff in the amount of $3,227.50, payable to Defendants' attorney within 30 days after service of the minute order.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 10/26/16
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***Portales v. I-5 Social Services Corporation, Inc.***
Court Case No. 16CECG03069

Hearing Date: October 27, 2016 **(Dept. 503)**

Motion: Petition to Approve Compromise of Minor's Disputed Claim

Tentative Ruling:

To grant. Orders signed. Hearing off calendar.

Explanation:

Pursuant to California Rules of Court, Rule 3.1312 and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

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